Supreme Court, U.S.
FILED

No. 09-1382 MAY 7 - 2010

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In The
Supreme Court of the United States

KRIS ALAN HAHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Kris Alan Hahn
223 14th Avenue NE
Minneapolis, MN 55413

Pro se Petitioner

QUESTIONS PRESENTED

The following questions are presented by the petitioner:

I. Does a district court acquire jurisdiction by the parties waiving jurisdiction in cases involving indictment by grand jury?

II. Are the federal circuit courts of appeals bound by United States Supreme Court precedent?

PARTIES BELOW

Petitioner Kris Alan Hahn was the Petitioner-Appellant in the court below. Respondent United States of America was the Respondent-Appellee in the court below.

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PETITION FOR WRIT OF CERTIORARI

Kris Alan Hahn, on behalf of himself, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, filed on February 16, 2010. There was no good-faith determination of the law in petitioner's case in either the district court or the Eighth Circuit Court of Appeals.

OPINIONS BELOW

The unreported Court of Appeals' order denying the petition for rehearing and for rehearing en banc was entered on February 16, 2010 and is reproduced at Pet. App 1a. The unreported Court of Appeals'

Judgment denying the application for certificate of appealability was entered on December 17, 2009 and is reproduced at Pet. App 2a. The District Court's memorandum opinion and order denying Petitioner's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence was entered on July 1, 2009 and is reproduced at Pet. App. 3a-15a.

JURISDICTIONAL STATEMENT

The Court of Appeals' final judgment, denial of petition for rehearing and for rehearing en banc, was entered on February 16, 2010.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution.

The Fifth Amendment, U.S. Constitution, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 2253, 28 U.S.C. § 2255, and Federal Rule of Criminal Procedure 7(b).

Title 28 U.S.C. § 2253 provides:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)
>
> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Title 28 U.S.C. § 2255 provides:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as

from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint

counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Federal Rule of Criminal Procedure7(b) provides:

(b) Waiving Indictment. An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights—waives prose-cution by indictment.

STATEMENT OF THE CASE

In as few words as possible, the situation in Petitioner's criminal case was this:

1. Petitioner was never indicted by a grand jury.

2. The lower court apparently "acquired" jurisdiction by Petitioner *waiving* jurisdiction—on the advice of his attorney—pursuant to Federal Rule of Procedure 7(b).

REASONS FOR GRANTING THE WRIT

The Writ must be granted because both the federal district court and the Eighth Circuit Court of Appeals ignored *this* Court's precedent spanning three (3) centuries.

The Writ must be granted because, if it is not, then this Court's precedent on the issue becomes completely meaningless.

I. A federal court cannot acquire jurisdiction simply by the parites waiving jurisdiction.

[N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 102 S.Ct. 2099, 2104 (1982) (citations omitted).

The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded. *Owen Equip. & Erection Co. v. Kroger*, 98 S.Ct. 2396, 2403 (1978).

A defendant may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court. *Schick v. United States*, 195 U.S. 65, 24 S.Ct. 826, 828 (1904).

Litigants cannot confer subject matter jurisdic-tion by agreement. *American Policyholders Inc. v. Nyacol Products*, 989 F.2d 1256, 1258 (1st Cir. 1993) (citations omitted).

[A] party can challenge the court's jurisdiction at anytime. *United States v. Barragan-Mendoza*, 174 F.3d 1024, 1027 (9th Cir. 1999).

A jurisdictional claim can never be waived (through forfeiture or even through purposeful waiver). *United States v. Baucum*, 80 F.3d 539, 541 (D.C. Cir. 1996).

Federal courts are not at liberty to overlook

limitations on their subject matter jurisdiction. *Francis v. Goodman*, 81 F.3d 5, 8 (1st Cir. 1996) (citation omitted).

Jurisdiction is not waived by a guilty plea. *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991).

A federal rule cannot be the basis of original jurisdiction. *Milan Exp., Inc. v. Averitt Exp., Inc.*, 208 F.3d 975, 979 (11th Cir. 2000).

Which is exactly what the prosecutor did in the instant case: attempt to acquire jurisdiction by the sumptuous use of Federal Rule of Criminal Procedure 7(b).

> **(b) Waiving Indictment.** An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights—waives prosecution by indictment.

Note the language, *"waives prosecution by indictment,"* not "waives *charging* by indictment." Here there was no indictment to waive.

Congress was without authority to enact Fed-eral Rule of Criminal Procedure 7(b) nor do the Courts have the authority to recognize it.

The law concerning indictment by grand jury and the *necessity* of an indictment *before* that indictment can be waived is equally clear.

Without an indictment or a presentment by a grand jury the district court exceeds it jurisdiction. *Ex Parte Wilson*, 5 S.Ct. 935, 937 (1885).

> A party cannot waive a constitutional right when its effect is to give a court jurisdiction....

> The fifth amendment to the Constitution, that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, provides for a requisite to jurisdiction...
>
> *Ex Parte McCluskey*, 40 Fed. 71, 74 (C. Ct. D. Ark. 1889) (citations omitted).

The absence of a valid waiver and lack of indictment is a defect affecting jurisdiction. *United States v. Teran*, 98 F.3d 831, 835 (5th Cir. 1996).

[S]erious criminal offenses...can be prosecuted only by indictment. *Schick v. United States*, *supra*, 24 S.Ct. at 827.

Infamous crimes must be proceeded against on grand jury indictment. *Brede v. Powers*, 203 U.S. 4, 8 S.Ct. 44 (1923).

I.e., even if Federal Rule of Criminal Procedure 7(b) were enacted within the enumer-ated powers given to Congress (which it was not, *infra*), for a waiver to be valid the *facts* would have had to have been investigated *first* and an indictment *returned*.

Where a valid indictment has already been obtained, a defendant's decision to plead to a superseding bill of information includes an impli-cit waiver of indictment that satisfies Rule 7(b). *United States v. Gaudet*, 81 F.3d 585, 590 (5th Cir. 1996).

It is well known that any ambiguity concern-ing criminal statutes is to be resolved in favor of the accused. See, *e.g.*, *United States v. Bass*, 404 U.S. 336, 347 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Smith v. United States*, 360 U.S. 1, 9 (1959).

No act of Congress can authorize a violation of the Constitution. *United States v. Brigoni-Ponce*, 95

S.Ct. 2574, 2587 (1975).

Any modification of the indictment by grand jury clause of the Fifth Amendment is, for all practical purposes, an amendment to the Consti-tution.

[Congress]...is not given power by itself...to amend the constitution. *Myers v. United States*, 47 S.Ct. 21, 37 (1926).

Congress [may not] change the meaning of the Constitution through the passage of ordinary legislation. *In re Young*, 141 F.3d 854, 859 (8th Cir. 1998).

Did this bill become a law in the manner prescribed by the Constitution? *Portland Gold Mining Co. v. Duke*, 191 Fed. 692, 696 (8th Cir. 1911).

The legislature cannot enact laws for accomplishments of objects not entrusted to the federal government. *Linder v. United States*, 268 U.S. 5, 45 S.Ct. 446, 69 L.Ed 819 (1925).

> [P]rinciples of law, whether embodied in the Constitution and laws of the United States, the Federal Rules of Civil Procedure or the local rules of a district court, must remain fixed and secure. The strictures governing court and prosecutor alike are designed to insure that the processes of criminal justice are carried out with care and deliberation, for were the law applied casually and without thought, the result would not be justice, and the enforcers of the law would become merely the custodians of power.
>
> *McCarthy v. Manson*, 554 F.Supp. 1275, 1279 (D. Conn. 1982).

II. Must Supreme Court precedent be followed by the lower courts or may the lower courts simply ignore Supreme Court precedent when they choose to do so?

It would appear that the district court in this action has "overruled" Eighth Circuit precedent.

> *See United States v. Taylor*, 519 F.3d 832, 836 (8th Cir. 2008) (noting that "[a] guilty plea waives all non-jurisdictional defenses," unless, with the consent of the court and the government, the plea is expressly conditioned on the right to appeal the denial of a specified pre-trial motion); *see also United States v. Cotton*, 535 U.S. 625, 631 (2002) (concluding that a defective indictment does not deprive a court of jurisdiction); *United States v. Kahlon*, 38 F.3d 467, 469 (9th Cir. 1994) (noting that the failure to return an indictment in open court as required by Rule 6(f) is merely a non-jurisdictional, procedural defect).
>
> *United States v. Clarkson*, 321 Fed.Appx. 534 (8th Cir. 2009).
>
> We are somewhat disadvantaged because subject-matter jurisdiction was not challenged in the district court, and the court made no findings on this issue. Questions of subject-matter jurisdiction, of course, may be raised at any time and may not be waived. *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). A court, including an appellate court, may raise the issue *sua sponte* and, indeed, the court has the duty to do so if

the record suggests jurisdiction is lacking. *Id.*

Yeldell v. Tutt, 913 F.2d 533 (8th Cir. 1990).

> Jurisdiction is always the first issue to decide; for without the power to hear an action and to execute a decision the sitting tribunal is actually not a court at all. In the overview, courts stay within the legislatively determined limits so that their power is properly used for the citizenry. The overstepping of the jurisdictional limits can lead at least to confusion, at the worst to a corruption of the granted power. Here we have confusion. Such underlying principles on the limits of jurisdiction must continually be realized when dealing with the individual case, for minor inroads to necessary and established principles may destroy the principles a slight step at a time.
>
> Concededly, if the District Court lacked jurisdiction to hear this case, the parties cannot waive jurisdiction by proceeding to a hearing on the merits. *Ahrens v. Clark*, 335 U.S. 188, 193, 68 S.Ct. 1443, 92 L.Ed. 1898 (1948); *United States v. Sahli*, 216 F.2d 33, 37 (7th Cir. 1954).
>
> *Lee v. United States*, 501 F.2d 494 (8th Cir. 1974).

Petitioner has demonstrated the issue. Now this Court needs to demonstrate that it "means what it says."

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.
>
> *Rodriguez De Quijas v. Shearson American Express, Inc.*, 490 U.S. 477, 484 (1989).

Note that, in this case, the Eighth Circuit Court of Appeals also overruled (or ignored) its *own* precedent.

CONCLUSION

Either the parties to an action may waive jurisdiction to give jurisdiction or they may not.

Either this Court issues binding precedent or it does not.

Which is it?

Only this Court can say.

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Kris Alan Hahn
223 14th Avenue NE
Minneapolis, MN 55413

Pro se Petitioner

Dated: _____, 2010